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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JORDANA WEISDORF-MAHSERJIAN,

Plaintiff and Appellant,

v.

SERCO, INC.,

Defendant and Respondent.

B206243

(Los Angeles County  
Super. Ct. No. BC347990)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Elizabeth A. Grimes, Judge. Affirmed.

Law Offices of Julia Azrael and Julia Azrael; Law Offices of Kevin C. Boyle and  
Kevin C. Boyle; Law Offices of Stephen A. Ebner and Stephen A. Ebner for Plaintiff and  
Appellant.

Law Offices of Patrick D. O’Keeffe and Patrick D. O’Keeffe for Defendant and  
Respondent.

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## **INTRODUCTION**

Plaintiff and appellant Jordana Weisdorf-Mahserjian sued her former employer, defendant and respondent Serco, Inc., for alleged violations of the California Fair Employment and Housing Act, Government Code section 12900 et seq. (FEHA). The jury found in favor of plaintiff on one of her four causes of action. The trial court issued an order awarding plaintiff 25 percent of the attorney's fees she requested and entered judgment in plaintiff's favor. Plaintiff contends that the trial court erroneously failed to award her all of the attorney's fees she requested. We affirm.

## **BACKGROUND**

### *1. The Allegations in Plaintiff's Complaint*

In her complaint, plaintiff alleges the following facts: Plaintiff worked for defendant beginning in June 1999. Her job duties consisted primarily of providing parking enforcement for the City of West Hollywood. In February 2003, plaintiff injured her left shoulder in an accident which occurred while she was working. As a result, plaintiff became a "disabled" individual. Plaintiff filed a workers' compensation claim and was unable to work for substantial periods of time.

Plaintiff's physicians advised her to limit her work to "light duty" status, which meant that she could not lift her left arm above her shoulder and could not excessively use her left hand. Defendant, however, declined to allow plaintiff to work with these restrictions. In October 2005, defendant terminated plaintiff's employment. Plaintiff contends that her termination was pretextual and was in retaliation for plaintiff having asserted her rights as a disabled person under the FEHA.

Plaintiff sets forth five causes of action in her complaint: (1) disability discrimination, (2) failure to provide reasonable accommodation of disability, (3) failure to engage in the interactive process, (4) wrongful termination in violation of public policy, and (5) retaliation.

### *2. The Jury Verdict*

The jury found that plaintiff had a disability, but also found that defendant did not know about it. The jury thus returned a verdict in favor of defendant with respect to

plaintiff's disability discrimination, failure to provide reasonable accommodation, and failure to engage in the interactive process causes of action. However, the jury found in plaintiff's favor with respect to her retaliation cause of action. It specifically found that plaintiff's workers' compensation injury leave was a "protected activity," and a "motivating reason" defendant terminated plaintiff. The jury awarded plaintiff damages in the amount of \$43,866.58 for past economic loss, including lost earnings and vacation pay, resulting from defendant's "retaliatory conduct."<sup>1</sup>

### 3. *Plaintiff's Motion for Attorney's Fees*

After the jury returned its verdict, plaintiff moved for an award of \$180,545.50 in attorney's fees. In support of her motion, plaintiff filed declarations by her three attorneys describing their qualifications and billing rates, and authenticating the bills for their services. The bills stated the tasks each attorney performed, the amount of time spent on each task, and the hourly rate charged by each lawyer. Plaintiff's lawyers worked on a contingency basis. Plaintiff calculated her attorney's fees by first multiplying the number of hours her attorneys worked on the case by their hourly rates. That product was \$144,434. Plaintiff then multiplied \$144,434 by a 1.25 multiplier. Plaintiff argued that the multiplier was necessary to compensate her lawyers for, inter alia, the risk they took handling the matter on a contingency basis.

In defendant's opposition to plaintiff's motion, defendant argued that the court should deny the motion outright or, in the alternative, award plaintiff 25 percent of the lodestar figure (\$144,434) claimed by plaintiff. Defendant argued that plaintiff should only recover 25 percent of her fees because she only prevailed on one out of four of her causes of action. Plaintiff argued that it was "irrelevant" that she did not prevail on all of her legal theories.

At the beginning of the hearing on the motion, the trial court stated: "I think plaintiff's counsel did an excellent job as usual. Her rates and hours are reasonable.

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<sup>1</sup> Plaintiff's fourth cause of action for wrongful termination in violation of public policy was not submitted to the jury.

However, plaintiff herself notwithstanding her excellent representation on account of the limitation of the facts achieved only a partial limited success. [¶] Therefore, application of the lodestar would lead to an excessive award. I contemplate awarding one quarter of that requested, \$45,135.50, which is a reasonable amount both in light of the verdict, the size of the verdict, and the plaintiff's limited success."

Defendant's lawyer Patrick D. O'Keefe, plaintiff's lawyer Julia Azrael, and the trial court subsequently had the following exchange:

"MR. O'KEEFE: . . . [¶] Obviously, I believe that the court has appropriately balanced the multiplier given the ultimate result achieved and again, there is a difference between the cause of action she prevailed upon and the three causes of action which the lion's share of the litigation surrounded, all of which were defense verdicts.

"THE COURT: All right.

"MS. AZRAEL: I'm the prevailing party, Your Honor. I didn't –

"THE COURT: That's why I contemplate awarding you over \$45,000 which is greater than the jury verdict. The fact that *a whole lot more time was spent primarily on other causes of action which she [plaintiff] lost* does not in my mind weigh in favor of increasing that award." (Italics added.)

Shortly thereafter, Ms. Azrael asked the trial court to explain how it calculated the \$45,135.50 attorney's fee award. In response, the court stated: "I divided [*sic*] . . . what you were requesting by 25 percent. Initially – and then I looked at what I came up with because I *estimated* that the cause of action that she won was a quarter of the overall case and then *I looked at the number and asked myself whether that seemed to be a reasonable award in light of all the factors I'm supposed to consider* having previously determined the lodestar would lead to an excessive result and I decided it was a reasonable amount."<sup>2</sup> (Italics added.)

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<sup>2</sup> Later, the court acknowledged that it multiplied plaintiff's claimed lodestar figure by 1.25, then multiplied that product by 25 percent.

After the hearing, the trial court entered judgment in plaintiff's favor and against defendant in the amount of \$43,866.58 in damages, \$45,135.50 in attorney's fees, and \$7,363.59 in costs. This appeal followed.

### **CONTENTIONS**

Plaintiff contends that the trial court erroneously reduced her attorney's fees and requests that this court award her the full \$180,542.50 she requested.

### **DISCUSSION**

#### *1. Standard of Review*

The FEHA provides that the trial court, "in its discretion, may award to the prevailing party reasonable attorney's fees and costs . . . ." (Gov. Code, § 12965, subd. (b).) We review a trial court's award of attorney's fees under the FEHA for abuse of discretion. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 445 (*Vo*); *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393 (*Horsford*).)

#### *2. Applicable Legal Principles*

In determining a fee award under the FEHA, "the trial court must first determine 'a "loadstar" or "touchstone" figure, which is the product of the number of hours worked by the attorneys and a reasonable fee per hour.' " (*Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 422 (*Greene*); see also *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1171 (*Weeks*).) The trial court may, however, increase or decrease the lodestar figure by taking various relevant factors into account, including the plaintiff's success or lack of success on his or her claims. (*Greene*, at p. 422; *Vo*, at p. 446; *Weeks*, at p. 1171.) This adjustment is made by applying a positive or negative multiplier to the base lodestar figure. (*Greene*, at p. 422.)

In exercising its discretion, the trial court must do so in a manner that, in its judgment, will best effectuate the purposes of the FEHA. (*Horsford, supra*, 132 Cal.App.4th at p. 394). "The basic, underlying purpose of FEHA is to safeguard the right of Californians to seek, obtain, and hold employment without experiencing discrimination on account of race, religious creed, color, national origin, ancestry,

physical disability, medical disability, medical condition, marital status, sex, age, or sexual orientation.” (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 582-583.)

Accordingly, the trial court should adjust the lodestar figure “to fulfill the statutory purpose of bringing ‘the financial incentives for attorneys enforcing important constitutional rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-service basis.’ ” (*Horsford*, at p. 395; see also *Weeks*, *supra*, 63 Cal.App.4th at p. 1172 [“it is recognized that some form of fee enhancement may be appropriate and necessary to attract competent representations of cases meriting legal assistance”].)

The trial court may in its discretion reduce the fee award when the plaintiff does not prevail on all of his or her claims. (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 157-158 (*Graciano*); *Greene*, *supra*, 101 Cal.App.4th at p. 423.) The plaintiff’s attorney’s fees, however, “need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.” (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130; see also *Graciano*, at pp. 157-159; *Greene* at pp 423-424.)

### 3. *Application of Law to the Facts of this Case*

The trial court correctly first determined the lodestar figure. It determined that the rates charged by plaintiff’s attorneys and the hours they spent on the case were “reasonable.” The trial court then *enhanced* the lodestar figure by a 1.25 positive multiplier.

The trial court then applied a negative multiplier of 0.25 to the enhanced lodestar figure on the ground that plaintiff only prevailed on her retaliation cause of action. Viewing the record in a light most favorable to defendant, as we must (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528), it appears that the trial court “estimated” that one fourth of plaintiff’s fees were related to her successful retaliation claim.

Plaintiff argues that the trial court should not have apportioned her attorney's fees because her retaliation cause of action arose from the same set of facts as her unsuccessful causes of action. As the party challenging the fee award, however, plaintiff "has an affirmative obligation to provide an adequate record so that we may assess whether the trial court abused its discretion." (*Vo, supra*, 79 Cal.App.4th at p. 447.) Plaintiff has not met her burden.

Plaintiff included in the record the three declarations filed by her lawyers in support of her motion for attorney's fees. In these declarations, however, the lawyers did not describe any common issues between plaintiff's retaliation cause of action and her three unsuccessful causes of action.

Plaintiff's complaint is similarly unhelpful. Although plaintiff stated in her complaint that she filed a workers' compensation claim, she did not specifically allege that filing such a claim or taking time off pursuant to the workers' compensation statutes was a "protected activity" under the FEHA. It is difficult to assess, based on the complaint alone, the extent to which there were common issues between plaintiff's successful and unsuccessful causes of action.

The trial court was in the best position to understand the relationship between plaintiff's retaliation claim and her other claims and to determine whether time spent on her other claims contributed to plaintiff's objectives at trial. (*Green, supra*, 101 Cal.App.4th at p. 423.) Apart from the special verdict, we have no record of the proceedings at trial. We also do not have a copy of the superior court docket sheet. We thus have no basis to determine that the trial court abused its discretion in estimating that 25 percent of plaintiff's attorney's fees are associated with her retaliation cause of action.

Plaintiff relies heavily on *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 430. There, the Court of Appeal found that under the facts of that case, the trial court did not abuse its discretion in awarding the plaintiff more than the lodestar figure even though plaintiff only prevailed on some but not all of his causes of action. (*Id.* at pp. 430-431.) The trial court reached its decision after finding that the plaintiff "obtained excellent results and apportionment of the fees was not appropriate

because the ‘issues in the case were common to one another and . . . intertwined . . . .’ (*Id.* at p. 431.) Here, by contrast, the trial court did not find that plaintiff obtained excellent results. Indeed, the record indicates that plaintiff reached less than excellent results even with respect to her retaliation cause of action. Plaintiff sought damages for past economic loss, future economic loss, past noneconomic loss and punitive damages, but was only awarded damages for past economic loss. Moreover, the trial court did not find that the issues between plaintiff’s retaliation cause of action and other causes of action were “intertwined.” *Wysinger* therefore is distinguishable from this case.

#### **DISPOSITION**

The judgment is affirmed. Plaintiff and defendant shall bear their own costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.